

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY)	
)	00-0579
Proposal to eliminate its Electric Fuel)	
Adjustment Clause and include fuel and)	
Power supply charges in base rates.)	

REDACTED SUPPLEMENTAL INITIAL BRIEF OF THE
CITIZENS UTILITY BOARD

The Citizens Utility Board, pursuant to the Hearing Examiner's ruling of January 29, 2001, hereby submits its Initial Brief and states as follows:

Introduction

On July 31, 2000, pursuant to Section 9-220(d) of the Public Utilities Act, Central Illinois Light Company ("CILCO") filed a proposal to eliminate its electric fuel adjustment clause ("FAC") and include fuel and power supply costs in its base rates. The Commission held hearings from December 18-19, 2000,. All parties filed Initial and Reply Briefs on January 9th and 17th 2001, respectively.

On January 25, 2000, CUB was notified of two newspaper articles regarding a dispute between CILCO and Freeman United Coal Company ("Freeman"). CILCO included costs associated with the Freeman contract in its initial proposal to eliminate its electric fuel adjustment clause. The articles indicated that CILCO intended to cancel the Freeman contract. Prior to this time no party to the case was aware of any such efforts.

On January 26, 2001, Illinois Commerce Commission Staff filed a Motion for Interim Order based upon CILCO's previously undisclosed efforts to cancel its coal purchase agreement with Freeman. Throughout the December hearings, CILCO's

witnesses repeatedly testified that the Freeman coal costs formed a basis for the costs identified in CILCO's proposal. However, as demonstrated in Staff's motion, CILCO was undertaking steps to terminate the Freeman contract as early as October 2000. *See generally*, Staff Motion for Interim Order and attachments thereto.

As a result of Staff's motion, the Hearing Examiner ordered all parties to orally respond. At the conclusion of oral arguments, the Hearing Examiner ordered additional "brief evidentiary hearings" designed to provide a clearer record of coal purchase costs and the Freeman/CILCO dispute.

I. CILCO Failed To Produce Competent Testimony Regarding Crown II Coal Costs

On January 29, 2001, the Hearing Examiner identified the general purpose of, and reasons for, the February 8, 2001 evidentiary hearings " . . . I believe the information presented in Staff's motion [for Interim Order] provides sufficient justification for accepting additional evidence on CILCO's Crown II [Freeman] coal costs and hearing cross-examination on that evidence." Tr. 30-31. At the evidentiary hearings, CILCO presented two witnesses, William G. Livingstone, an Energy Trading representative (CILCO Ex. 3.0, 10.0), and Glenn L. Davidson, an accountant in the Sales and Marketing Business Unit (CILCO Ex. 1.0, 11.0) whose testimony failed to fully address the stated purpose of the additional proceedings.

Mr. Livingstone and Mr. Davidson provided testimony with the primary purpose of "calculating the cost of fuel and purchased power during the projected test period under alternative scenarios" ore rebutting Staff witnesses' testimony. CILCO Ex. 10.0 and 11.0 (Testimony of William G. Livingstone and combined Testimony of William G. Livingstone and Glenn L. Davidson). While this was certainly requested of CILCO, the

overarching and perhaps most salient purpose of the hearings was to provide testimony on the Crown II coal costs and create a record adequately addressing those issues since none was created at the December proceedings, due to CILCO's non-disclosure. Moreover, it appears that all parties except CILCO seemed to understand that this was the Hearing Examiner's expectation. Tr. 407-410, 411-412, 457.

The supplemental testimony presented by CILCO's witnesses with respect to coal purchase costs does nothing to elucidate this murky issue for the Commission. Just two days prior to the hearing, CILCO provided all parties with a letter from Freeman projecting its first quarter 2001 coal charges (to CILCO) at *****per ton. *See* CILCO Ex. 10.2,

. However, according to CILCO's witnesses this figure could significantly increase. Tr. 442-443, 484. But, neither witness was able to identify the specific coal purchase costs that CILCO anticipates incurring and therefore rolling into base rates under Section 9-220 (d).

Moreover, Mr. Livingstone testified that CILCO's revised CILCO Exhibit 10.1, a series of charts which purport to demonstrate the component costs incurred as well as the adjustments requested by the Hearing Examiner, is incomplete in its current form and lacks significant data that would ultimately affect the proposed FAC reflected therein. Tr. 490-491. For example, based upon CILCO Ex. 10.2, the charts in 10.1 should reflect a change in the per ton cost of coal for 2001. However, CILCO failed to make these changes. Tr. 393, 394. The record further reflects that 10.1 does not reflect a recalculated FAC based upon coal purchase costs. *Id.* This will admittedly impact the FAC adjustment to base rates. Tr. 394. Based upon these deficiencies, the Commission

should give this exhibit little, if any, weight since it fails to provide the Commission with complete information upon which to base its final decision.

Neither CILCO witness was able to give the Commission any pertinent information regarding CILCO's intended cancellation of the Freeman contract, such as the status of the on-going dispute, or the likelihood of arbitration. Tr. 472-473. Each witness acknowledged that decisions regarding the Freeman agreement were (or would be made) at levels higher than theirs. Tr. 419. While they were able to identify two individuals who, in their opinions, might be more knowledgeable about the current status of the contract dispute as well as any anticipated actions (Tr.428, 429-437), not one of the individuals identified was present for the evidentiary hearings. Tr. 415-418. When afforded the opportunity to present testimony regarding the dispute, (or at least the documents evidencing the dispute) CILCO declined. Tr. 470.

CILCO's ineffective testimony simply amounted to a waste of the Commission's time. The evidentiary hearings were futile due to CILCO's failure to provide witnesses competent to fully testify to the issues previously identified by the Hearing Examiner. Additionally, the incomplete nature of the exhibits only serves to muddy the waters, not clear them. Ultimately, CILCO fails to clearly present its data. Instead the company leaves the Commission to figure it out for themselves. It is not the Commission's job to cull a proper FAC from unclear, incomplete testimony. It is CILCO's responsibility to provide clear evidence, a full record and reasonable, prudent and necessary costs upon which a just base rate can be formed. 220 ILCS 5/9-220(d). Further, under 83 Ill. Adm. Code part 200. 550, it is the petitioner's responsibility to diligently prosecute their case. Here, CILCO failed at this effort by: a.) providing largely incompetent witnesses and

incomplete data, b.) failing to fully comply with the Hearing Examiner's request and c.) failing to provide the Commission with testimony/evidence regarding the dispute that formed the very basis of the evidentiary hearings. Accordingly, the Commission should give very little weight to the supplemental evidence to the extent that it is incomplete and the witnesses were unable to provide competent testimony upon which the Commission can rely in rendering a final decision. Further, in light of the foregoing and as more fully described below, CUB continues to believe that the pending Motion to Dismiss should be granted.

II. Calculations Based Upon ICC Docket No. 99-0468 Are Premature And Harmful to Tariffed Customers.

On or about December 20, 2000, the Commission issued its Final Order in Docket No. 99-0468, CILCO's fuel adjustment reconciliation case. The Commission found that "CILCO must, in this FAC reconciliation and in future FAC reconciliations, include the cost of purchased power when calculating the average cost of fuel associated with sales not subject to the FAC." *See* ICC Order in Docket No. 99-0468. (Emphasis added).

During the January 29, 2001 status hearing/oral arguments preceding the evidentiary hearings in this docket, the Hearing Examiner requested that CILCO recalculate its purchased power costs consistent with the Commission's order in 99-0468. As the Commission held in that case: "[u]sing only the average cost of CILCO's own generation to determine [fuel costs associated with sales not subject to the FAC] results in unjustly requiring regulated customers to bear more than their share of CILCO's fuel costs." *See* Final Order, ICC Docket No. 99-0468. CUB raised this issue in both its Initial and Reply Briefs in this docket. CUB Initial Brief at pp. 5-6; CUB Reply Brief at

pp. 4-6. CILCO's recalculated costs for the purposes of this evidentiary proceeding make this discriminatory practice abundantly clear.

By averaging the costs of regulated and unregulated sales, the cost to regulated (tariffed or residential customers) increases. Tr. 473. CILCO's efforts to disprove this theory are baseless since its own documents clearly demonstrate that the cost of retail contract purchases (non-FAC sales) are approximately three times greater than the CILCO average system costs (tariffed sales) over the same period. Tr. 479.

On February 7, 2001, the Commission granted each party's application for rehearing in ICC Docket No. 99-0468. Additionally, on February 2, 2001, Staff filed a Motion to Correct Commission Order, stating *inter alia*, that the Commission's Order describes methods for calculating the purchased power costs that are inconsistent with the Commission's own findings and result in CILCO shifting the risk of loss and costs to its captive (tariffed) customers. Staff Motion at p. 4. Staff proposes that "the proper method of calculating average cost is to total generation cost plus purchased power costs, less the incremental cost of non-regulated transactions." *Id.* This motion is currently pending, as are all applications for rehearing, as well as CILCO's Motion to Stay distribution of the refund the Commission ordered it to pay. *Id.* Until the appeals are heard and a final decision made, CUB believes any reliance upon the methodology employed in ICC Docket No. 99-0468 is premature, particularly when the great concerns regarding this methodology's disproportionate impact upon tariffed customers remains unresolved.

III. CILCO's Actions Warrant Dismissal Of Its Proposal

On January 29, 2001, IIEC orally moved for dismissal of the instant petition. In response thereto, Staff filed a letter with the Hearing Examiner indicating that it did not oppose dismissal. CUB filed a response in support of IIEC's motion, citing among other things, CILCO's deliberate concealment of material and relevant facts that directly bear upon the outcome of this matter. CUB's Response to IIEC's Motion to Dismiss at p. 2. CILCO failed to file any response whatsoever. The motion is still pending before the Commission.

If the Commission had any doubt as to whether dismissal is appropriate, those doubts should now be put to rest. The record is replete with examples of CILCO's failure to address the coal cost issue. When questioned about CILCO's intentions with respect to the Freeman contract, CILCO's witnesses replied: "I have no personal knowledge of the timing or the strategy or the intents of the letters." Tr. 430 (CILCO witness, William Livingstone). "No, I know nothing more than what's in the papers." *Id.* (CILCO witness Glenn Davidson). CILCO's witnesses were repeatedly unable to answer any questions regarding the Freeman dispute. Tr. 429-436. Similarly, not only were they unable to state the appropriate purchase price/cost of coal to be factored into base rates, but also they were unaware that a key agreement affecting the coal contract was in fact terminated in June 2000. Tr. 438-447.

CILCO can offer no excuse, justification or rationale for its failure to comply with the Hearing Examiner's order. As set forth in CUB's Response to IIEC's Motion to Dismiss, 83 Ill. Adm. Code Part 200.25 provides that "parties which do not act diligently and in good faith shall be treated in such a manner as to negate any disadvantage or

prejudice experienced by other parties.” *Id.* CUB Response at p.3. CILCO did not make a good faith effort to provide the Commission with the appropriate witnesses. As both Mr. Livingstone and Mr. Davidson testified, the decisions regarding the Freeman dispute were made at a level above that of an accountant or energy trader. CILCO should have supplied the testimony of those decision makers if it wanted the Commission to be fully informed of this aspect of its case.

CILCO’s failure to diligently comply with Commission orders, coupled with its complete disregard for the Act and Commission authority necessitate dismissal. The Hearing Examiner essentially gave CILCO every opportunity to establish a more clear record in support of its proposal, yet CILCO chose to disregard it. The record does not demonstrate that CILCO will continue to take coal from the Freeman mine beyond March 23, 2001, nor does it provide a clear tangible cost for coal from this source. See Staff Motion for Interim Order. Accordingly, the Commission should dismiss CILCO’s proposal for its failure to diligently prosecute its case. In the alternative, the Commission should disregard CILCO’s claim of coal costs beyond March 23, 2001—the date upon which CILCO intends to cease taking coal from the Freeman mine.

Dated: February 14, 2001

Respectfully submitted,

Karin M. Norington
Attorney for CUB

Karin M. Norington
Citizens Utility Board
208 S. LaSalle, Suite 1706
Chicago, IL 60604
(312) 263-4282 ext. 110
Fax (312) 263- 4329
Email: knorington@citizensutilityboard.org